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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 250

SUN OIL COMPANY, *Petitioner*,

v.

FEDERAL POWER COMMISSION, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

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No.

SUN OIL COMPANY, *Petitioner*,

v.

FEDERAL POWER COMMISSION, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Sun Oil Company, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in Cause No. 19424 on April 25, 1962. The judgment granted the Federal Power Commission's (sometimes called "Respondent") motion to dismiss and dismissed the petition to review.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported and is printed in Appendix A, pp. 1a-6a; R. 74-79.[1] The order of the Federal Power Commission, in the form of a letter dated September 21, 1961 (R. 26-27) of which review was sought in the court below, is not yet reported, and is printed in Appendix A, pp 6a-8a. The Commission's order dated November 22, 1961 denying rehearing (R. 28) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered April 25, 1962 (Appendix A, p. 8a; R. 80). Rehearing was denied May 29, 1962 (Appendix A, p. 9a; R. 85). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and section 19(b) of the Natural Gas Act.

QUESTION PRESENTED

Is Respondent's order issuing a temporary certificate containing a statement which declares inoperative and of no effect at law any rate change provision in a listed rate filing executed on or after April 3, 1961, with the exception of the provisions permitted by section 154.93 of the Commission's Regulations, a reviewable order under section 19(b) of the Natural Gas Act, when Petitioner's listed rate filing with respect to the sale was executed after April 3, 1961 and contained proscribed rate change provisions which were applicable to the sale?

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[1] Record references are to the transcript of record prepared by the Clerk of the Court of Appeals. A certificate of record in lieu of record was filed by Respondent at the time it filed its motion to dismiss (R. 57-59). The court acted on such motion and the record was not printed. The statement of the proceeding herein is summarized from the pleadings before the court below which are set forth in the transcript of record as prepared by the Clerk of the court.

STATUTES INVOLVED

This case involves section 7 and 19 of the Natural Gas Act, pertinent provisions of which are printed in Appendix B, pp. 10a-14a.

STATEMENT OF THE CASE

The letter order of September 21, 1961, which the court below determined was not a reviewable order, was issued in connection with Petitioner's application to amend an existing certificate of public convenience and necessity to authorize the sale of natural gas from additional acreage not covered by the original certificates and nine previous amendments thereto.

Although not involved in this proceeding, the Commission by its Opinion No. 323 and accompanying order (22 F.P.C. 391) issued August 10, 1959, as amended, granted Petitioner a certificate in Docket No. G-14791 to sell gas to Transwestern Pipeline Company (Transwestern) with a price condition. Thereafter, Petitioner filed its contract dated July 10, 1958 for the sale of gas to Transwestern as its rate schedule applicable to the sale authorized by the foregoing certificate issued in Docket No. G-14791.

A favored-nation clause and a price redetermination clause at four-year intervals were included as parts of the pricing provisions of the contract[2] dated July

[2] These clauses, which Petitioner believes Respondent's order issued September 21, 1961, if valid, renders inoperative and of no effect at law, insofar as they apply to the sale authorized by that order, were reproduced by Petitioner and filed in the court below as an appendix to Petitioner's answer to Respondent's motion to dismiss (R. 70-72). The clauses are a part of the first item listed in the certificate of the record in lieu of record (R. 58).

10, 1958 with Transwestern and filed as Petitioner's rate schedule. In addition, the contract authorized Petitioner, at its sole option and by unilateral notice, to transfer certain undeveloped lands and leases listed in the contract, after the discovery of natural gas thereon, to the list of producing leaseholds and lands contained in the contract and thereby to commit the gas to be produced from lands and leaseholds so transferred to the terms of the sale in the contract of July 10, 1958 including the pricing provisions thereof.

On July 3, 1961 Petitioner gave Transwestern unilateral notice of its election to make additional acreage subject to the July 10, 1958 contract. Petitioner applied on July 12, 1961 for an amendment to its outstanding certificate to make the sale covered by the unilateral notice of July 3, 1961 and, pending action thereon, for temporary authority to make the sale. On the same date Petitioner also filed the unilateral notice to Transwestern as a supplement to Petitioner's rate schedule for its sale to Transwestern.

On September 21, 1961 the Respondent issued the letter order involved in this proceeding. It granted Petitioner temporary authorization to make the sale. Respondent also accepted and listed the unilateral notice to Transwestern dated July 3, 1961 as a supplement to Petitioner's effective rate schedule (Appendix A, pp. 6a-8a). As already pointed out, the notice to Transwestern made applicable to the sale all terms of the contract dated July 10, 1958 including the favored-nation and price-redetermination at four-year interval clauses. The letter order dated September 21, 1961 contained the following statement:

> "Further, in the event that any document comprising the listed rate filing was executed on or

after April 3, 1961, and contains provisions, either therein or by adoption of the terms and provisions of other agreements, for a change in rate other than those permitted by Section 154.93 of the Commission's Regulations, such rate change provisions shall be inoperative and of no effect at law and any tendered rate change under such provisions will be rejected."
(Appendix A, p. 7a; R. 26)

The proviso to section 154.93 to which the above statement refers was adopted by Order No. 232 issued March 3, 1961 as amended by Order No. 232A issued March 31, 1961. It provides as follows:

"*Provided*, That in contracts executed on or after April 3, 1961, for the sale or transportation of natural gas subject to the jurisdiction of the Commission, any provision for a change of price other than the following provisions shall be inoperative and of no effect at law; the permissible provisions for a change in price are:

(1) provisions that change a price in order to reimburse the seller for all or any part of the changes in production, severance, or gathering taxes levied upon the seller;

(2) provisions that change a price to a specific amount at a definite date; and

(3) provisions that, once in five-year contract periods during which there is no provision for a change in price to a specific amount [paragraph (2)], change a price at a definite date by a price-redetermination based upon and not higher than a producer rate or producer rates which are subject to the jurisdiction of the Commission, are not in issue in suspension or certificate proceedings, and are in the area of the price in question" (R. 31).

On October 23, 1961 Petitioner filed a timely application for rehearing of the order issued September 21, 1961, such application being limited to the statement quoted above. By a letter order dated November 22, 1961 Respondent dismissed the application stating that Petitioner had not shown itself aggrieved and that Petitioner had not tendered a rate change proposing to make effective the flexible pricing provisions contained in the contract of July 10, 1958 (R. 28).

On January 12, 1962 Petitioner filed a petition to review the order issued September 21, 1961 limited to the statement quoted above (R. 2-31). Such proceeding was assigned Case No. 19424 by the court below. Petitioner also filed with the court on January 22, 1962 a motion requesting that the review proceedings in Case No. 19424 be consolidated for hearing with Case No. 19001 in which Petitioner was seeking review of the proviso to section 154.93 of the Commission's Regulations (R. 32-37). The court, by an order of February 15, 1962 denied the motion to consolidate. The oral argument in this proceeding was set for the same date as the hearing on the merits in Case No. 19001 (R. 41). On March 27, 1962 the court heard argument on Respondent's motion to dismiss (R. 73).

On April 25, 1962 the court issued its opinion (Appendix A, pp. 1a-6a; R. 74-79) and judgment (Appendix A, p. 8a; R. 80) in this proceeding granting Respondent's motion to dismiss and dismissing the petition for review. On the same date, the court below dismissed the petition to review in Cause No. 19001.

On May 16, 1962 Petitioner filed a petition for rehearing in this proceeding (R. 81-84). The court, by an order dated May 29, 1962 denied such petition, (Ap-

pendix A, p. 9a; R. 85). Upon motion filed June 8, 1962 (R. 86-89), the court, by order entered June 14, 1962 stayed the issuance of the mandate for a period of thirty days, such stay to be continued in force until final disposition by the Supreme Court, provided that within thirty days from the date of the June 14, 1962 order there shall be filed with the Clerk of the Court of Appeals a certificate that a certiorari petition and the record have been filed with the United States Supreme Court (R. 90).

REASONS FOR GRANTING THE WRIT

Concurrently with the filing of this petition, Petitioner is filing a petition for a writ of certiorari to the Fifth Circuit (Case No. 19001) for the purpose of determining the reviewability of the order promulgating the proviso to section 154.93 of the Commission's regulations quoted above (ante p. 5). The court below held such order to be nonreviewable in Case No. 19001.

In Petitioner's view, the instant case involves a specific application of the proviso to section 154.93 as broadened by the Respondent's order issued September 21, 1961. Respondent contended below and the court found that the statement in the order of September 21, 1961 of which Petitioner unsuccessfully sought review is only "'* * * a means of calling the regulation to the attention of the applicant'" (Appendix A, p. 5a; R. 78). Petitioner believes the court below erred in this holding, as hereinafter discussed.

I. The Order Under Review, Unless Set Aside, Renders the Flexible Pricing Provision, Applicable to the Sale Authorized in Such Order, Inoperative and of No Effect at Law

The statement in the order issued September 21, 1961, quoted above (ante p. 7), to which Petitioner objected, sets forth in definitive language that in the event any document executed after April 3, 1961, comprising the listed rate filing (and Petitioner's unilateral notice of July 3, 1961 was the only listed rate filing), contains by adoption provisions for changing rates other than those permitted by section 154.93, such rate change provisions shall be inoperative and of no effect at law. In addition, it is stated in clear language that any tendered rate changes under the provisions of the listed rate filing executed on or after April 3, 1961 (which contain proscribed flexible pricing provisions) will be rejected. These references to the listed rate filing make the statement applicable only to Petitioner's rate filing.

There can be no question that Petitioner's July 3, 1961 unilateral notice makes the flexible pricing provisions set forth in the contract of July 10, 1958 applicable to the sale authorized by the order issued September 21, 1961. These flexible pricing provisions, consisting of a favored-nation clause and a price-redetermination clause at four-year intervals, clearly are not the type of rate change provisions permitted by section 154.93 of the Commission's Regulations. Consequently, the statement in the September 21, 1961 order is only applicable to Petitioner's rate filing and it declares the proscribed flexible price provisions adopted by such filing to be inoperative and of no effect at law.

The apparent object of the proviso to section 154.93 of the Respondent's Regulations is to render inopera-

tive and of no effect at law any pricing provision not permitted by the proviso. The court's conclusion that the statement in the order issued September 21, 1961 is intended only to bring the existence of the proviso to Petitioner's attention appears to be unreasonable and contrary to the object of the Respondent in adopting the rule.

It is apparent from an analysis of the language of the statement in the order of September 21, 1961 and the proviso to section 154.93 of the Regulations themselves that the statement is broader than the proviso in two material respects; namely (1) the proviso relates only to contracts executed on or after April 3, 1961—the statement relates to any *document* executed on or after April 3, 1961, and (2) the statement adds a further provision that rate filings based on proscribed flexible pricing provisions will be rejected. Had the statement related to "any contract" executed on or after April 3, 1961 it would have no applicability to Petitioner because the applicable contract of Petitioner was executed on July 10, 1958. The statement could not be a mere notice of the existence of the regulation adopted by the proviso because, as shown above, the statement was materially different than the proviso. In addition the statement contains references to any document executed after April 3, 1961 comprising the listed rate filing. This makes the statement only applicable to Petitioner's unilateral notice of July 3, 1961.

Under the foregoing analysis, Petitioner submits that the court's adoption of the Respondent's construction of the statement is in error and that its ruling dismissing petitioner's petition to review on the ground that the order was not reviewable is also in error. The language of the statement in the September 21, 1961 order clearly signifies that Petitioner shall not exercise

any of the rights accorded it by the flexible pricing provisions adopted by its listed rate filing dated July 3, 1961.

II. Respondent's Order of September 21, 1961 Is Reviewable Under Section 19(b) of the Natural Gas Act

Contrary to the holding below that the order of which Petitioner sought review is merely a step in the administrative process and is interlocutory (Appendix A, p. 5a; R. 78), the order was final in that it granted Petitioner temporary authorization to make the sale of additional gas to Transwestern. Thus, there can be no question that the order was a final order within the meaning of section 19(b) of the Natural Gas Act.[3]

Contrary to the court's finding that the language in the letter order of which Petitioner complains has no coercive effect (Appendix A, 5a; R. 78), the analysis in the preceding section clearly shows that the statement in the order renders inoperative and of no effect at law the flexible pricing provisions as adopted by the listed rate filing dated July 3, 1961. Such action, in holding the flexible pricing clauses in Petitioner's rate filing for naught, clearly "aggrieves" Petitioner by fixing its legal relationship with its purchasers and is a reviewable order. *Isbrandtsen Co.* v. *United States,* 211 F. 2d 51 at 55 (relying upon *Columbia Broadcasting System* v. *United States,* 316 U.S. 407, 425 (1942)),

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[3] *Algonquin Gas Transmission Co.* v. *Federal Power Commission,* 201 F. 2d 334, 337-8 (1st Cir. 1953); *Texaco, Inc.* v. *Federal Power Commission,* 290 F. 2d 149, 157 (5th Cir. 1961); *The Pure Oil Company* v. *Federal Power Commission,* 292 F. 2d 350 (7th Cir. 1961); *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission,* 270 F. 2d 404 (10th Cir. 1959); *J. M. Huber Corp.* v. *Federal Power Commission,* 294 F. 2d 568 (3rd Cir. 1961); *Sohio Petroleum Co.* v. *Federal Power Commission,* 298 F. 2d 465 (10th Cir. 1961).

cert. denied sub. nom. Japan-Atlantic and Gulf Conference v. *United States*, 347 U.S. 990 (1954).

Other courts, such as the United States Court of Appeals for the Tenth Circuit in *Phillips Petroleum Company* v. *F.P.C.*, 227 F. 2d 470 (1955), have also ruled that,

> "* * * reviewability extends to an order issued by the Commission which finally determines the legal rights of the parties with respect to matters within the scope of review * * *". (227 F. 2d at 474).

And that court held in an earlier decision that:

> "* * * The rule that only a party aggrieved by a decision may appeal is recognized, but to be aggrieved it is not necessary that there be an actual pecuniary loss. The proper test is whether the decision invades the legal rights of a person or operates adversely on his property rights and interests" *Keeler* v. *Commissioner of Internal Revenue*, 180 F. 2d 707 at 709 (10th Cir. 1950) (Footnote omitted).[4]

Even if it were considered that the statement in the order issued September 21, 1961 is in the nature of a rule or regulation, it would still be reviewable for the reasons discussed in the concurrently filed petition for certiorari with respect to the proviso to section 154.93 of the Commission's Regulations. However, as pointed out in the preceding section, the statement, because of its own terms, could only have applicability to Petitioner's rate filing and would not be a rule of general applicability.

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[4] See also *Cities Service Gas Company* v. *Federal Power Commission*, 255 F. 2d 860 (10th Cir. 1958), *cert. denied sub. nom. Magnolia Petroleum Company* v. *Cities Service Gas Company*, 358 U.S. 837 (1958); *Sun Oil Company* v. *Federal Power Commission*, 266 F. 2d 222 (5th Cir. 1959), *affirmed* 364 U.S. 170 (1960).

III. This Petition Involves Important Legal and Other Considerations

In the petition for a writ of certiorari being concurrently filed with this Court in respect to the proviso to section 154.93 of the Respondent's Regulations, Petitioner showed how the limitations imposed by such proviso are contrary to the intent of Congress to preserve private contractual arrangements needed to accomplish some of the purposes considered desirable when Congress enacted the Natural Gas Act. Therefore it is important that the proviso be subjected to judicial review. The reasons for granting certiorari in that case are also reasons for granting the petition in this case.

This petition together with the concurrently filed petition illustrates the difficulties in obtaining court review of regulations and orders which in Petitioner's view have a far-reaching and adverse effect on the initial rate-making and rate-changing powers of independent producers. These powers have remained undefined and unaffected by the Act under this Court's decision in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956). In the instant case, by an order which Petitioner believes is intended to render inoperative and of no effect at law flexible pricing provisions in an existing contract, Petitioner, until the present time, has been denied court review to test the correctness of the order.

Petitioner believes that although the issues in this proceeding relate to one contract, the factual situation is an important one when considered in connection with the proviso to section 154.93 of the Regulations as adopted by Order No. 232 issued March 3, 1961, as amended by Order No. 232A issued March 31, 1961.

CONCLUSION

Respondent's order issued September 21, 1961 renders inoperative and of no effect at law the flexible pricing provisions adopted by Petitioner's rate filing dated July 3, 1961, adversely affects Petitioner's contract rights and is a reviewable order under section 19(b) of the Natural Gas Act. In Petitioner's view, the order, unless reviewed and set aside, will have a far-reaching and adverse effect on the use of private contractual arrangements by natural gas companies as intended by Congress and will be contrary to the regulatory scheme of the Natural Gas Act.

Accordingly, pursuant to section 19(b) of the Natural Gas Act and paragraph 1(b) of Rule 19 of the Rules of this Court, Petitioner prays that a writ of certiorari be granted.

Respectfully submitted,

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Of Counsel

Certificate of Service

I certify that the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was served upon Respondent, the Federal Power Commission, by mailing a copy thereof, postage prepaid, to each of the following attorneys for Respondent on the 14th day of July, 1962:

Archibald Cox, Solicitor General
Department of Justice
Washington 25, D. C.

Richard Solomon, General Counsel
Howard E. Wahrenbrock, Solicitor
Peter H. Schiff, Esquire
Federal Power Commission
441 G Street, N. W.
Washington 25, D. C.

OMAR L. CROOK
Attorney for Petitioner,
Sun Oil Company

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19424

SUN OIL COMPANY, *Petitioner*,

versus

FEDERAL POWER COMMISSION, *Respondent*.

PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL POWER COMMISSION

(April 25, 1962)

BEFORE TUTTLE, Chief Judge, and JONES and GEWIN, Circuit Judges.

JONES, Circuit Judge: Sun Oil Company made a contract on June 10, 1958, for delivery of natural gas from lands designated and described in the contract to Transwestern Pipeline Company. The contract gave Sun the right, subject to some requirements not material here, to commit the gas from certain other described lands to the sale covered by the contract by the unilateral action of giving notice to Transwestern. The contract was tendered to the Federal Power Commission as a rate schedule. It contained a favored-nation escalation clause and a price-redetermination clause. A certificate of public convenience and necessity was issued by the Commission covering only the gas produced from the lands included in the initial commitment of the contract. On March 3, 1961, the Commission adopted its Order No. 232 which, on March 31, 1961, was amended

by Order No. 232-A. The orders added to Section 154.93 of the Commission's Rules and Regulations a proviso relating to contract provisions for price changes.[1] The substance of the proviso, as it may affect this case, is to render inoperative and of no effect all types of flexible pricing provisions, with some stated exceptions, contained in contracts subject to the jurisdiction of the Commission which are executed on or after April 3, 1961.[2]

On July 3, 1961, Sun gave Transwestern notice, pursuant to the contract terms, that additional acreage and the gas to be produced therefrom were being committed to the contract. On July 12, 1961, Sun applied to the Commission for an amendment to its certificate for temporary authorization to sell the gas produced from the lands added to the contract. On September 21, 1961, the Commission issued its

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[1] Provided, That in contracts executed on or after April 3, 1961, for the sale or transportation of natural gas subject to the jurisdiction of the Commission, any provision for a change of price, other than the following provisions shall be inoperative and of no effect at law; the permissible provisions for a change in price are:

(1) provisions that change a price in order to reimburse the seller for all or any part of the changes in production, severance, or gathering taxes levied upon the seller;

(2) provisions that change a price to a specific amount at a definite date; and

(3) provisions that, once in five-year contract periods during which there is no provision for a change in price to a specific amount [paragraph (2)], change a price at a definite date by a price-redetermination based upon and not higher than a producer rate or producer rates which are subject to the jurisdiction of the Commission, are not in issue in suspension or certificate proceedings, and are in the area of the price in question.

[2] The Regulation was further amended by Order No. - of the Commission which has no application to the question here presented.

letter order[3] granting to Sun temporary authorization to sell gas from the lands added to the contract by the unilateral notice to Transwestern. The order contained a state-

[3] Temporary authorization is hereby granted to Sun Oil Company to sell natural gas for resale in interstate commerce to Transwestern Pipeline Company from the additional acreage as described in the petition filed July 12, 1961, in Docket No. G-15791, subject to the following conditions:

(1) That the rate therefor shall not exceed 17.0 cents per Mcf at 14.65 psia, such rate to be effective until a different prospective rate is established in the proceeding, Docket No. G-15791.

(2) Written acceptance of this authorization by a responsible official of your company within 20 days of the date hereof.

The related rate filing will be considered accepted for filing to be effective on the date of initial delivery, subject to the provisions of Sections 154.94(c) and 154.101 of the Commission's regulations under the Natural Gas Act, upon compliance with the above conditions.

This filing has been designated as follows:

Description	*Designation*
Letter Agreement 7-3-61	Supplement No. 12 to Sun Oil Company FPC Gas Rate Schedule No. 122

Please advise the Commission of the date of commencement of deliveries under such supplement, making reference in your communication to the supplement as designated above.

Further, in the event that any document comprising the listed rate filing was executed on or after April 3, 1961 and contains provisions, either therein or by adoption of the terms and provisions of other agreements, for a change in rate other than those permitted by Section 154.93 of the Commission's Regulations, such rate change provisions shall be inoperative and of no effect at law and any tendered rate change under such provisions will be rejected.

This authorization and the acceptance of the above supplement are without prejudice to such final disposition of the petition to amend the order issuing certificate as the record may require. Furthermore, once service is commenced under this authorization it may not be discontinued without permission of the Commission issued pursuant to the provisions of the Natural Gas Act.

ment[4] that in the event any document executed on or after April 1, 1961, which therein or by adoption provided for rate changes, except those permitted by Section 154.93 of the Commission's Regulations, such provision will be inoperative and of no effect at law and any rate change under such provisions will be rejected. Sun made an application for a rehearing requesting the removal of this statement. By a letter order dated November 22, 1961, in which the statement is referred to as a proviso, the Commission dismissed the application. Sun has filed in this Court its petition for review of the Commission's order of September 21, 1961, in so far as it seeks to make inapplicable, to sales of gas from the added lands, the clauses of the original contract for favored-nation escalation and price redetermination.

In its petition for review Sun asserts that the Commission, in the adoption of Order No. 232 and Order No. 232-A, exceeded the authority conferred upon it by the Natural Gas Act;[5] that the statement or proviso in the letter order is contrary to and goes beyond the provisions of Order No. 232 and Order No. 232-A, that the Commission's order deprives Sun of property without due process of law and is arbitrary, capricious and unjustly discriminatory. The Commission has moved to dismiss the petition for review for lack of jurisdiction on the ground that the petitioner is not "aggrieved" within the meaning of Section 19(b) of the Natural Gas Act[6] and that it will not be aggrieved unless it attempts to obtain authorization for a rate increase under the flexible price provisions of the original contract

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[4] See note 3 supra.

[5] 15 U.S.C.A. §§ 717 et seq.

[6] Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Court of Appeals of the United States . . .

and such increase is rejected by the Commission by reason of the provisions of the amendment to the Regulations.

The letter order which Sun seeks to have reviewed is not of a definitive character dealing with the merits of a proceeding before the Commission. It does not presently affect the rights or duties of Sun. It is merely a step in the administrative process and is interlocutory and not reviewable. *Shank, Trustee*, v. *Federal Power Commission*, 5th Cir. 1956, 236 F. 2d 830, cert. den. 352 U. S. 970, 77 S. Ct. 361, 1 L. Ed. 2d 324; *Lee, Trustee*, v. *Federal Power Commission*, 5th Cir. 1956, 236 F. 2d 835, cert. den. 352 U. S. 970, 77 S. Ct. 361, 1 L. Ed. 2d 323. That the language in the letter order of which Sun complains has no coercive effect is shown by the meaning given to it by the Commission. In the Motion to Dismiss of the Commission, it is said:

> "Petitioner's claim of actual controversy appears to be based on the contention that the language it objects to in the certificate represents a Commission decision that Section 154.93 is applicable to this case. In fact, however, the Commission has made no such decision. The language complained of is 'boiler-plate' language which has been regularly used in numerous temporary certificates, not as a decision on the facts but as a means of calling the regulation to the attention of the applicant.
>
> "We are authorized to state that the language used was not intended to broaden, narrow, or apply the regulation, or to determine its applicability or scope, or to constitute a condition of the certificate. It is solely of an informatory nature; as was the abandonment language in the Sunray certificate (270 F. 2d 404 * * *) which called attention to a provision of the Act. Like that language with respect to Sunray, the language here in issue has no present impact on Sun."

To the extent the foregoing is a construction of the language of the certificate, we adopt it. To the extent it states principles of law, we agree with it. We would add that neither the adoption of the amendments to the Regulations,

their mention in the certificate, nor the Commission's construction of them is in any sense decisive as to their validity. That issue is not now before us. We shall defer our consideration of it until it is properly presented.

The Commission's motion is granted and the petition for review is

DISMISSED.

A true copy

Test: EDWARD W. WADSWORTH

Clerk, U. S. Court of Appeals, Fifth Circuit

By CLARA R. JAMES
Deputy

SEAL

New Orleans, Louisiana
June 15, 1962

Address all Communications
to the Secretary

FEDERAL POWER COMMISSION
WASHINGTON 25, D. C.

Docket No. G-15791
Sun Oil Company

Sep 21 1961
AIRMAIL

Sun Oil Company
P. O. Box 2880
Dallas 21, Texas
Attention: Mr. R. L. Sullivan

Gentlemen:

Temporary authorization is hereby granted to Sun Oil Company to sell natural gas for resale in interstate commerce to Transwestern Pipeline Company from the additional acreage as described in the petition filed July 12,

1961, in Docket No. G-15791, subject to the following conditions:

(1) That the rate therefor shall not exceed 17.0 cents per Mcf at 14.65 psia, such rate to be effective until a different prospective rate is established in the proceeding, Docket No. G-15791.

(2) Written acceptance of this authorization by a responsible official of your company within 20 days of the date hereof.

The related rate filing will be considered accepted for filing to be effective on the date of initial delivery, subject to the provisions of Sections 154.94 (c) and 154.101 of the Commission's regulations under the Natural Gas Act, upon compliance with the above conditions.

This filing has been designated as follows:

Description	Designation
Letter Agreement 7-3-61	Supplement No. 12 to Sun Oil Company FPC Gas Rate Schedule No. 122

Please advise the Commission of the date of commencement of deliveries under such supplement, making reference in your communication to the supplement as designated above.

Further, in the event that any document comprising the listed rate filing was executed on or after April 3, 1961 and contains provisions, either therein or by adoption of the terms and provisions of other agreements, for a change in rate other than those permitted by Section 154.93 of the Commission's Regulations, such rate change provisions shall be inoperative and of no effect at law and any tendered rate change under such provisions will be rejected.

This authorization and the acceptance of the above supplement are without prejudice to such final disposition

of the petition to amend the order issuing certificate as the record may require. Furthermore, once service is commenced under this authorization it may not be discontinued without permission of the Commission issued pursuant to the provisions of the Natural Gas Act.

By direction of the Commission.

J. H. Gutride
Secretary.

cc: H. B. Coe
Suite 1304
1700 "K" Street, N. W.
Washington 6, D. C.

Mr. C. E. Webber
1608 Walnut Street
Philadelphia, Pennsylvania

Transwestern Pipeline Company
P. O. Box 1502
Houston 1, Texas

Judgment

Extract from the Minutes of April 25, 1962

No. 19424

Sun Oil Company

versus

Federal Power Commission

This cause came on to be heard on the petition of Sun Oil Company for review of an order of the Federal Power Commission issued on September 21, 1961 in Docket No. G-15791, and on the Motion of the Federal Power Commission filed on February 27, 1962 to dismiss the petition for review, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the Commission's motion is granted and the petition for review is dismissed.

No. 19424

On Petition for Rehearing

Before TUTTLE, Chief Judge, and JONES and LEWIN, Circuit Judges.

PER CURIAM

IT IS ORDERED That the petition for rehearing in the above-entitled and numbered cause be, and it is, hereby DENIED.

APPENDIX B

Excerpts from the Natural Gas Act

EXTENSION OF FACILITIES; ABANDONMENT OF SERVICE.

SEC. 7.

(c)[2] No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be

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[2] Subsection 7 (c) amended; (d), (e), (f) and (g) added February 7, 1942 by Public Law No. 444, 77th Congress, Chapter 49, 2d Session [H. R. 5249], 56 Stat. 83, 84.

prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however*, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporay acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U.S.C. § 717f(c)][3]

[3] As originally enacted June 21, 1938 by Public Law No. 688, 75th Congress, Chapter 556, 3d Session [H. R. 6586], 52 Stat. 825, Section 7 (c) read as follows:

"(c) No natural-gas company shall undertake the construction or extension of any facilities for the transportation of natural gas to a market in which natural gas is already being served by another natural-gas company, or acquire or operate any such facilities or extensions thereof, or engage in transportation by means of any new or additional facilities, or sell natural gas in any such market, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require such new construction or operation of any such facilities or extensions thereof: *Provided, however*, That a natural-gas company already serving a market may enlarge or extend its facilities for the purpose of supplying increased market demands in the territory in which it operates. Whenever any natural-gas company shall make application for a certificate of convenience and necessity under the provisions of this subsection, the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission. In passing on applications for certificates of convenience and necessity, the Commission shall give due consideration to the applicant's ability to render and maintain adequate service at rates lower than those prevailing in the territory to be served, it being the intention

(d)[4] Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require. [56 Stat. 84 (1942); 15 U.S.C. § 717f(d)]

(e)[5] Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U.S.C. § 717f(e)]

---

of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest." (52 Stat. 825, (1938))

Public Law No. 444, 77th Congress, Chapter 49, 2d Session [H. R. 5249], 56 Stat. 83, which amended Section 7 (e), effective February 7, 1942, was enacted after the Commission's decision *In the Matter of Kansas Pipe Line & Gas Company*, 2 F. P. C. 29.

[4, 5] See footnote 2, p. 7.

* * * * *

SEC. 19

(b)[9] Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States[10] for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or, in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do.

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[9] The Act of August 28, 1958 (72 Stat. 941 at 947) added the last sentence to subsection (a) and, in the second sentence of subsection (b), substituted "Transmitted by the clerk of the court to" for "served upon", substituted "file with the court" for "certify and file with the court a transcript of" inserted "as provided in section 2112 of title 28, United States Code", and, in the third sentence, substituted "jurisdiction, which upon the filing of the record with it shall be exclusive" for "exclusive jurisdiction".

[10] Circuit Court of Appeals of the United States was redesignated as "United States Court of Appeals" by Act of June 25, 1948, 62 Stat. 870.

The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in [former] sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, sec. 1254).

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 250

SUN OIL COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The order of the Commission (Pet. App. A., pp. 6a–8a) is reported at 26 F.P.C. 521. The opinion of the Court of Appeals (Pet. App. A., pp. 1a–6a) is reported at 304 F. 2d 290.

JURISDICTION

The judgment of the Court of Appeals was entered on April 25, 1962 (Pet. App. A., p. 8a). A petition for rehearing, timely filed, was denied on May 29, 1962 (Pet. App. A, p. 9a, R. 85). The petition for a writ of certiorari was filed on July 14, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

Whether a statement in a Commission order merely advising the recipients of that order of the existence of particular Commission regulations is reviewable under Section 19(b) of the Natural Gas Act.

STATUTES INVOLVED

Pertinent provisions of the Natural Gas Act are set forth in Appendix B to the Petition at pages 13a–14a.

STATEMENT

Petitioner, an independent producer of natural gas, sought review in the Court of Appeals for the Fifth Circuit of that portion of an order granting it temporary authorization to sell gas which advised it of the substance of existing Commission regulations proscribing certain types of rate-changing provisions in producer contracts. The Court of Appeals dismissed the petition, holding that petitioner was not presently aggrieved.

The pertinent facts may be stated as follows: Petitioner made a contract on June 10, 1958, for delivery of natural gas to Transwestern Pipeline Company from lands designated and described in the contract. The contract gave petitioner the unilateral right, by giving notice to Transwestern, to commit the gas from certain other described lands to the sales under the contract. After the Commission granted petitioner a certificate of public convenience and necessity to sell the gas produced from the acreage originally committed to the sale, the contract was filed as a rate schedule. The contract contains two price-changing provisions of the type known as indefinite escala-

tion clauses: (a) a so-called "favored-nations" clause, giving petitioner a contractual right to charge the highest price paid by the buyer (with certain exceptions, and with adjustments for difference in quality, pressure, gathering and compressing arrangements and other pertinent factors affecting price) in certain named counties in Texas and Oklahoma; and (b) a clause permitting a price renegotiation or redetermination every four years. Pet. App. A, p. 1a.

On March 3, 1961, the Commission adopted Order No. 232 (26 F.R. 1983), which, as amended on March 31, 1961, by Order No. 232A (26 F.R. 2850), modified Section 154.93 of its general regulations to declare "inoperative and of no effect at law" most indefinite escalation clauses in all producer contracts executed on or after April 3, 1961.[1] Sun's petition

[1] These orders added to Section 154.93 of the Regulations the following proviso (18 C.F.R. (Cum. Supp., 1962), 154.93):

"* * * That in contracts executed on or after April 3, 1961, for the sale or transportation of natural gas subject to the jurisdiction of the Commission, any provision for a change of price other than the following provisions shall be inoperative and of no effect at law; the permissible provisions for a change in price are:

"(1) Provisions that change a price in order to reimburse the seller for all or any part of the changes in production, severance, or gathering taxes levied upon the seller;

"(2) Provisions that change a price to a specific amount at a definite date; and

"(3) Provisions that, once in five-year contract periods during which there is no provision for a change in price to a specific amount [paragraph (2)], change a price at a definite date by a price-redetermination based upon and not higher than a producer rate or producer rates which are subject to the jurisdiction of the Commission, are not in issue in suspension or certificate proceedings, and are in the area of the price in question."

to review those orders was dismissed by the Fifth Circuit, and review of that dismissal is now being sought in No. 249, this Term. The favored-nations and price renegotiation clauses in Sun's 1958 contract with Transwestern are the type of pricing provision so proscribed if, but only if, they are included in a contract executed on or after April 3, 1961.

On July 3, 1961, several months after the promulgation of this amendment to the general regulations, petitioner gave Transwestern notice, pursuant to the terms of the 1958 contract, that additional acreage and the gas to be produced therefrom were being committed to that contract. On July 12, 1961, petitioner applied to the Commission for an amendment to its certificate which would authorize the sale of gas produced from the additional acreage. Pending Commission action on this application, petitioner requested temporary authorization to sell the additional gas, on the ground that delay would result in the drainage of its reserves by wells on adjacent properties. Pet. App. A, p. 2a.

On September 21, 1961, the Commission issued a letter order granting petitioner temporary authorization to sell gas from the lands added to the contract by the unilateral notice to Transwestern, subject to a rate condition not challenged by petitioner. Pet. App. A, pp. 6a–8a. The order contained a statement that (Pet. App. A, p. 7a):

> • • • in the event that any document comprising the listed rate filing was executed on or after April 3, 1961, and contains provisions, either therein or by adoption of the terms and provisions of other agreements, for a change in

> rate other than those permitted by Section 154.93 of the Commission's Regulations, such rate change provisions shall be inoperative and of no effect at law and any tendered rate change under such provisions will be rejected.

Sun filed an application for "rehearing" of the order, requesting deletion of the above statement (Pet. App. A, p. 4a) (hereinafter referred to as "the "statement" or "the caveat"). By letter order of November 22, 1961, the Commission dismissed the application on the ground that Sun was not aggrieved by the order granting it the temporary authorization to make sales (Pet. App. A, p. 4a, R. 28).

In its petition for review, filed on January 12, 1962, Sun contended that the letter order issuing the temporary authorization purported to apply Orders No. 232 and 232A, that those orders exceeded the Commission's authority, that the statement complained of went beyond the Commission's regulations under the Natural Gas Act, and that the order deprived Sun of property without due process of law. (Pet. App. A, p. 4a).

The Commission moved to dismiss this petition, pointing out, *inter alia* (Pet. App. A, p. 5a):

> "Petitioner's claim of actual controversy appears to be based on the contention that the language it objects to in the certificate represents a Commission decision that Section 154.93 is applicable to this case. In fact, however, the Commission has made no such decision. The language complained of is 'boiler-plate' language which has been regularly used in numerous temporary certificates, not as a decision on the facts but as a means of calling the regulation to the attention of the applicant.

> "We are authorized to state that the language used was not intended to broaden, narrow, or apply the regulation, or to determine its applicability or scope, or to constitute a condition of the certificate. It is solely of an informatory nature, as was the abandonment language in the Sunray certificate (270 F. 2d 404 * * *) which called attention to a provision of the Act. Like that language with respect to Sunray, the language here in issue has no present impact on Sun."

In dismissing the petition for lack of aggrievement, the court explicitly adopted this language as the correct construction of the order sought to be reviewed and as a statement of applicable law.

ARGUMENT

The court below, we believe, was clearly correct in concluding that the caveat to which petitioner objects did not presently affect its rights and that the petition should, therefore, be dismissed. There is no conflict among the circuits on this point. Indeed the Tenth Circuit reached the same result with respect to a similar caveat. *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 270 F. 2d 404 (C.A. 10). Moreover, the case is of no general importance, as the Commission's regulations have subsequently been amended in such a way as to make it unlikely that the issue here presented will be a recurring one.[2] Hence, there is no warrant for review by this Court.

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[2] By Order No. 242, 27 F.R. 1356, the Commission amended its regulations to provide that, effective April 2, 1962, applica-

Petitioner contends (Pet. 8–10) that the order of September 21, 1961, granting it a temporary authorization for the sale of gas, contained a caveat which was intended to declare inoperative certain provisions of the contract under which the authorized sales were to be made. The court below properly rejected that contention. The caveat, *supra*, pp. 4–5, which petitioner seeks to have deleted was intended to be and is merely a cautionary reference to, and restatement of, the first proviso of Section 154.93 of the Commission's regulations under the Natural Gas Act, 18 C.F.R. (Cum. Supp., 1962) 154.93,[3] which declares, in pertinent part (25 F.P.C. at 610):

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tions by producers for certificates would be rejected if they were based on contracts entered into on or after that date containing any proscribed price-changing provisions and that such contracts would be rejected as rate schedules. Since the statement here complained of is embodied only in orders granting temporary authorizations or accepting rate schedules for filing and since such orders are no longer being issued for sales under contracts executed subsequent to April 2, 1962, and containing a proscribed escalation clause, it follows that the issue in this case could not arise in the future except in connection with a contract, if any there be, which was executed between April 3, 1961, and April 2, 1962, but for some reason has not yet been filed with the Commission.

However, we should point out that there are two similar cases now pending in the Court of Appeals for the Tenth Circuit which the Commission has moved to dismiss. *Texaco, Inc.*, v. *Federal Power Commission*, C.A. 10, No. 6947; *Pan American Petroleum Corp.* v. *Federal Power Commission*, C.A. 10, No. 6973.

[3] This proviso was promulgated by Order No. 232 (25 F.P.C. 379, 26 F.R. 1983, as amended by Order No. 232A, 25 F.P.C. 609, 26 F.R. 2850). Sun's petition to review those orders was dismissed in *Sun Oil Co.* v. *Federal Power Commission*, 304 F. 2d 293, petition for certiorari pending, No. 249, this Term.

> * * * That in contracts executed on or after April 3, 1961, for the sale or transportation of natural gas subject to the jurisdiction of the Commission, any provision for a change of price other than the following provisions shall be inoperative and of no effect at law; * * *

This proviso became effective on April 3, 1961. Starting in July 1961, the Commission began the practice of calling the proviso of the regulation to the attention of producers before they began new services by including the caveat in every order issuing a temporary authorization—whether or not the particular sales contract involved included any impermissible price-changing provisions. Indeed, petitioner itself had been granted temporary authorization for another sale by a letter order of August 29, 1961, which included the same caveat, although the contract there contained no indefinite pricing provision.[4] It is plain from the very language of the caveat—which is phrased entirely in the subjunctive and commences with the words "in the event that * * *"—that its function is purely informative and that it was not intended as a specific determination that any particular provision of any particular contract is inoperative.

Sun takes the position that since (a) the caveat refers to any "document" executed on or after April 3, 1961, whereas the proviso of the regulation relates

[4] Only fixed price escalations—which are clearly permissible—were included in the contract involved in the August 29 letter. It is of interest that the August 29, 1961, letter was on a printed form which the Commission has routinely used unless conditions were attached to the temporary authorization. See *infra*, App. p. 12. In the present case a price condition, not here involved, was attached.

only to any "contract" executed on or after that date, and since (b) Sun's rate filing contains a "document" (the unilateral notice of July 3, 1961), but (allegedly) not a "contract," executed after the crucial date, it follows that the caveat must be a specific and broadened application of the proviso to Sun's particular filing, rather than merely a notice of the proviso's existence. This contention has no merit. The caveat is not applicable to any document, even one executed on or after April 3, 1961, unless that document contains an indefinite pricing provision prohibited by the proviso to Section 154.93 of the regulations. To fall within this requirement, the proscribed indefinite pricing clause must be one contracted for after April 3, 1961, for Section 154.93 in terms makes inoperative only clauses contracted for after that date. If, therefore, as Sun contends, the gas from the acreage added in July 1961 was contracted for on June 10, 1958 (the date of its original agreement with Transwestern), then the indefinite pricing provisions of that contract would not fall within the language of the caveat. A contrary result would, of course, obtain if the unilateral notice to Transwestern, executed on July 3, 1961, were itself a "contract" incorporating by reference the indefinite pricing clauses of the 1958 agreement. The caveat itself, however, does not purport to decide that question. The question will be decided only if and when Sun files with the Commission a rate change pursuant to the favored-nation or price-redetermination clause in its contract. And at that time, the sole issue will be whether these clauses are proscribed by the proviso to the regulation, not

whether they fall within the advisory caveat in the order here challenged.

As the Court of Appeals expressly decided, the Commission's caveat was not intended to broaden the scope of the regulation. Its sum and substance is: "in the event any proscribed indefinite pricing clause is contained in the rate filing, even though by reference to an earlier agreement, it will be inoperative *if contracted after April 3, 1961.*" Its sole purpose and effect is to put recipients of temporary authorizations on notice of the regulation, spelling out one inherent legal effect of the regulation itself, *i.e.*, that it would not be avoided by the expedient of incorporating the language of a pre-April 3, 1961, contract into a contract executed after that date.[5]

---

[5] Even if the court below had held that the statement constituted a Commission decision that pricing provisions of Sun's contract fell within the proscription of the regulation, Sun still would not be presently aggrieved. For there was no showing of the facts necessary to entitle it to increase its contract price under those provisions or any likelihood of the occurrence of such facts. Whether such a situation will ever arise is wholly speculative, for the prices provided by the other provisions of Sun's contract will be from 6 to 9 cents above the 17 cents per Mcf presently prevailing in that area, and an overriding condition of Sun's temporary authorization, not here in question, limits the rate it may collect to a maximum of 17 cents. Even apart from that limitation, the indefinite pricing provisions would contractually entitle Sun to a higher price, generally speaking, only if the prevailing price in the area should rise above the price fixed by the other provisions of Sun's contract.

None of the cases upon which petitioner relies (Pet. 10–11) is in conflict with the decision below, for in each of these cases there was immediacy or certainty of impact wholly absent here.

CONCLUSION

For these reasons, the petition for certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

JOSEPH D. GUILFOYLE,
Acting Assistant Attorney General.

JOHN G. LAUGHLIN, JR.,
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RICHARD A. SOLOMON,
General Counsel,

HOWARD E. WAHRENBROCK,
Solicitor,

PETER H. SCHIFF,
Attorney,
Federal Power Commission.

SEPTEMBER 1962.

F.P.C. FORM 141(REVISED)

ADDRESS ALL COMMUNICATIONS TO THE SECRETARY

FEDERAL POWER COMMISSION
WASHINGTON 25

AUG 24 1961

Docket No. CI-61-1780
Sun Oil Company

AIRMAIL

Sun Oil Company
1608 Walnut Street
Philadelphia, Penna/lvania

Attention: Mr. C. E. Webber

Gentlemen:

Your statement, filed pursuant to Section 157.28 (c)(1) of the Commission's Regulations, of your intention to invoke said Section and initiate the service proposed in the [redacted] certificate application, Docket No. CI-1780, is hereby accepted.

CI-1780

You are also advised that the related rate schedule, identified by your statement pursuant to Section 157.28 (c)(2) of the Regulations and listed at the bottom of this letter, has been accepted for filing to be effective on the date of initial delivery. Please return the enclosed duplicate copy with such date inserted in the space provided. This acceptance of the rate schedule for temporary service is no assurance that it will be accepted by the Commission for permanent service.

In the event that any of the documents comprising the listed rate schedule contain provisions for future automatic adjustment in rates and charges based upon new or increased taxes or prices paid for gas by or to others, price redetermination provisions, or any similar provision, your attention is directed to the fact that such provisions, when invoked to change the effective rates and charges, will constitute a change in such rates and charges within the meaning of Section 4 (d) of the Natural Gas Act and Section 154.94 of the Commission's Regulations under such Act. The Act and the Commission's Regulations require that such changes be filed with the Commission not more than 90 nor less than 30 days prior to the proposed effective date thereof.

Further, in the event that any document comprising the listed rate schedule was executed on or after April 3, 1961 and contains provisions, either therein or by adoption of the terms and provisions of other agreements, for a change in rate other than those permitted by Section 154.93 of the Commission's Regulations, such rate change provisions shall be inoperative and of no effect at law and any tendered rate change under such provisions will be rejected.

This acceptance for filing shall not be construed as constituting approval of any rate, charge, classification, or any rule, regulation or practice affecting such rate or service contained in the rate filing; nor shall such acceptance be deemed as recognition of any claimed contractual right or obligation associated therewith; and such acceptance is without prejudice to any findings or orders which may be made in the final disposition of this proceeding or any other findings or orders which may be made in the final disposition of this proceeding or any other findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against your company.

This constitutes all requisite temporary authorization to commence the sale of gas, but such authorization and acceptance of the rate schedule are without prejudice to such final disposition of the certificate application, as amended, as the record may require and, furthermore, once service is commenced under this authorization it may not be discontinued without permission of the Commission issued pursuant to the provisions of the Natural Gas Act.

Very truly yours,

J. H. GUTRIDE
Secretary

cc: Sun Oil Company
1700 "K" Street, N. W.
Washington 6, D. C.

Attention: Mr. P. E. Noble

Rate Schedule Designation
Sun Oil Company

Description of Document	Date of Letter of Transmittal	FPC Gas Rate Schedule No.	Supplement No.	Date of Initial Delivery
Notification	5-31-61 6-16-61	134	-	
Contract	4-14-61 6-16-61	134	1	

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 250

SUN OIL COMPANY, *Petitioner*,

v.

FEDERAL POWER COMMISSION, *Respondent*.

REPLY BRIEF OF PETITIONER SUN OIL COMPANY

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FEDERAL POWER COMMISSION, *Respondent*.

REPLY BRIEF OF PETITIONER SUN OIL COMPANY

Pursuant to Rule 24(4) of this Honorable Court, Petitioner, Sun Oil Company, submits its reply brief to the brief for the Federal Power Commission (Respondent) in opposition.

PRELIMINARY STATEMENT

This is a companion case to No. 249. In that case Petitioner is seeking review of orders of the Respondent issued March 3, 1961 and March 31, 1961, promulgating rules which declare inoperative and of no effect at law all flexible pricing provisions, except those specifically exempted therein, in contracts executed on or after April 3, 1961, for the sale or transportation of natural gas in interstate commerce, subject to the jurisdiction of the Respondent.

This proceeding involves, in Petitioner's view a specific application of the rules promulgated by the orders sought to be reviewed in Case No. 249, as well as an extension of such rules to contracts executed prior to April 3, 1961, the effective date of the rules. The order sought to be reviewed in the instant case granted Petitioner a temporary certificate of public convenience and necessity to make additional sales pursuant to a contract dated July 10, 1958. Such contract was made applicable to the sale by Petitioner giving unilateral notice to the purchaser on July 3, 1961, of Petitioner's intent to apply production from additional leases to an already existing sale.

The letter order dated September 21, 1961 granting the temporary certificate contained the following statement set forth on pages 4 and 5 of the petition:

> "Further, in the event that any document comprising the listed rate filing was executed on or after April 3, 1961 and contains provisions, either therein or by adoption of the terms and provisions of other agreements, for a change in rate other than those permitted by Section 154.93 of the Commission's Regulations, such rate change provisions shall be inoperative and of no effect at law and any tendered rate change under such provisions will be rejected" (Appendix A, p. 7a of Pet.; R. 26).

This statement in Petitioner's view not only purports to apply the rules involved in Case No. 249 to a specific sale, but also to broaden and retroactively apply the rules to Petitioner's contract of July 10, 1958, insofar as it is applicable to the sale authorized by the September 21, 1961 letter order.

In the Court below, Respondent contended that the statement was solely of an informative nature and was

not intended to broaden or apply the rules.[1] The Court below agreed with Respondent's interpretation of the statement.[2]

ARGUMENT

In the petition for a writ of certiorari Petitioner set forth reasons why it believes the Court below erred in holding that the statement contained in the order issued September 21, 1961 did not apply or broaden the rules of which review is sought in the companion proceeding, Case No. 249 (Pet. pp. 8-9). These arguments will not be repeated herein. However, as the brief for Respondent calls this Court's attention to Respondent's Order No. 242 (27 F.R. 1356 [Fn. 2, p. 6]) amending its regulations (promulgated by Respondent's March 3, 1961 and March 31, 1961 orders) to provide for the rejection of any tendered contract rate schedule executed after April 2, 1962, containing the proscribed contract provisions, it seems appropriate to emphasize that the March 1961 orders of which Petitioner sought review by an appeal of the September 21, 1961 order contained no provision for rejecting rate schedule filings and only related to contracts executed on or after April 3, 1961 (Pet. p. 5, R. 31). Thus, in Petitioner's view, Respondent has applied, in part, the rejection provisions of Order No. 242 to Petitioner's contract executed on July 10, 1958 as it relates to the sale authorized by the order issued September 21, 1961, both retroactively and even before Order No. 242 was issued on February 8, 1962. Additionally, of course, the statement in the order issued September 21, 1961, under Petitioner's view, broadens the appli-

[1] Pet. to Rev., App. A, p. 5a.

[2] Ibid, p. 5a.

cability of the rules set forth in the March 1961 orders to "any document" whereas the rules only relate to "contracts" executed on or after April 3, 1961.

In the brief for Respondent in opposition (Fn. 2, pp. 6-7) it is stated "* * * that there are two similar cases now pending in the Court of Appeals for the Tenth Circuit which the Commission has moved to dismiss," *Texaco, Inc.* v. *Federal Power Commission*, No. 6947 and *Pan American Petroleum Corp.* v. *Federal Power Commission*, No. 6973. On September 5, 1962, after the Court had heard arguments on the motions to dismiss, the Clerk of the Court advised Respondent's solicitor by letter that the motions to dismiss in these and other cases have been postponed until the cases are heard on the merits.[3] This action by the Tenth Circuit would suggest that that Court has not been convinced that statements similar to (if not identical with) the statement in the order of which review is here sought do not apply the rules promulgated by the March 1961 orders to the temporary certificates involved in those proceedings. The Fifth Circuit dismissed the petition for review in the instant case without a hearing on the merits. Petitioner contends that the statement in the order issued September 21, 1961 not only applies such rules to its sales authorized by such order, but also broadens the rules and applies them retroactively to a contract dated July 10, 1958.

The reliance in the brief in opposition (p. 6) on the Tenth Circuit's decision in *Sunray Mid-Continent Oil Company* v. *Federal Power Commission*, 270 F. 2d 404, that "* * * the caveat to which petitioner objects did not presently effect its rights * * *" is clearly inappli-

[3] A copy of such letter is included as an appendix to this reply brief, *infra*, p. 8.

cable under Petitioner's view of the effect of the statement in the order issued September 21, 1961.[4] In Case No. 6043 involved in the *Sunray* decision and to which it would seem that the brief relates, the Court held that Respondent's statement in a temporary certificate, in effect, calling attention to Section 7(b) of the Natural Gas Act, was not reviewable, because the Court pointed out that the applicant in that case "* * * is currently selling its gas and has made no affirmative effort to cease * * *" and the "* * * Commission has made no objection to the status quo * * *" (270 F. 2d at 407). However, under Petitioner's view of the effect of the statement in the order issued September 21, 1961 Respondent has declared certain provisions of Petitioner's 1958 contract not even subject to the rules promulgated by the March 3, 1961 and March 31, 1961 orders to be inoperative and no effect at law as such 1958 contract relates to the sale authorized by the order issued September 21, 1961. An order which voids contract provisions, as Petitioner believes the statement in the September 21, 1961 order purports to do, is clearly reviewable under the decisions cited on pages 10-11 of the petition for a writ of certiorari. Moreover, the decision of the Fifth Circuit in *Texaco, Inc.* v. *Federal Power Commission*, 290 F. 2d 149, 157 (1961) clearly holds that an independent producer must seek review of a condition in a certificate, and in Petitioner's view the statement of which review is sought is such a condition, wifhin the time specified in Section 19(b) of the Natural Gas Act from the date the order granting the certificate is issued.[4]

[4] *See also H. L. Hunt* v. *Federal Power Commission*, F. 2d ——— (Nos. 19065, *et al.*, July 19, 1962, petition for rehearing *en banc* pending).

This proceeding involves important legal and other considerations, contrary to the assertion in the brief in opposition (p. 6) that "* * * the case is of no general importance, as the Commission's regulations have subsequently been amended in such a way as to make it unlikely that the issue here presented will be a recurring one * * *." This proceeding, as well as Case No. 249, seeks review of Order No. 232 issued March 3, 1961, as amended by Order No. 232A issued March 31, 1961. Order No. 242 (27 F.R. 1356) to which the above-quoted statement relates makes no changes, as such, in the rules adopted by Order No. 232, as amended by Order No. 232A. Indeed, the validity of Order No. 242 rests upon, and is determined by, the validity of Order No. 232, as amended by Order No. 232A, to which this appeal relates. Hence, the issue with respect to the validity of Order No. 232, as amended by Order No. 232A, is not in any way mooted or otherwise affected by the issuance of Order No. 242. Such latter order only provides for a method of enforcing Order No. 232, as amended by Order No. 232A, after a specific date.

The fact that Order No. 242 changes the machinery for enforcing the rules promulgated in Order No. 232, as amended by Order No. 232A, does not in any way mitigate against the importance to Petitioner and other independent producers of the rights Respondent seeks to destroy by those rules. In the petition for a writ of certiorari in Case No. 249 (pp. 16-18), to which reference was made in the petition in this case, Petitioner showed, it believes, how the limitations imposed by such rules are contrary to the intent of Congress to preserve private contractual arrangements needed to accomplish some of the purposes considered desirable when Congress enacted the Natural Gas Act.

For all the foregoing reasons and the reasons set forth in its petition for a writ of certiorari, Petitioner respectfully prays that its petition be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

Office of the Clerk

Denver 2, Colorado

September 5, 1962.

6947, 6973, 6975,
6976-6977, 7002,
7018, 7023, 7025,
7026.

Mr. Howard Wahrenbrock, Solicitor,
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Dear Sir:

You are advised that the motions to dismiss filed in the following cases have been postponed until the cases are heard on the merits. The record should be certified immediately. The cases are: No. 6947, Texaco, Inc. v. F.P.C., No. 6973, Pan American Petroleum Corporation v. F.P.C., Nos. 6975, 6976, 6977, Pan American Petroleum Corporation v. F.P.C., No. 7002, Pan American Petroleum Corporation v. F.P.C., No. 7018, Sun Oil Company v. Federal Power Commission, Nos.

7023, 7025, 7026, Phillips Petroleum Company v. Federal Power Commission.

Very truly yours,

ROBERT B. CARTWRIGHT
Robert B. Cartwright
Clerk

RBC:nk[illegible]
CC to:

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